

ARKANSAS SUPREME COURT

No. CR 07-1288

WAIMONUSHUN SMITH
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered February 14, 2008

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF
PULASKI COUNTY, CR 2005-3135,
HON. JOHN W. LANGSTON,
JUDGE]

MOTION DENIED.

PER CURIAM

A jury found petitioner Waimonushun Smith guilty of second degree murder and sentenced him to 480 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Smith v. State*, CACR 06-700 (Ark. App. Feb. 7, 2007). Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied by an order entered August 29, 2007. Petitioner filed in the trial court a notice of appeal as to that order on October 10, 2007. When the record was tendered to this court, our clerk correctly declined to file it because the notice of appeal was not timely filed with the circuit clerk. Petitioner then filed the pro se motion for belated appeal that is before us.

A petitioner has the right to appeal a ruling on a petition for postconviction relief. *See Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) (per curiam). However, along with that right goes the responsibility to timely file a notice of appeal within thirty days of the date the order was entered in accordance with Ark. R. App. P.–Civ. 4(a). If a petitioner fails to timely file a notice of appeal,

he may move this court to file a belated appeal in accordance with Ark. R. App. P.--Crim. 2(e).

In *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004), this court clarified its treatment of motions for rule on the clerk and motions for belated appeal. We said that there are only two possible reasons for an appeal not to be timely, either the party or attorney filing the appeal is at fault or there is good reason. *Id.* at 116, 146 S.W.3d 891. If the party believes there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present. *Id.* If the petitioner fails to timely file notice of appeal, a belated appeal will not be allowed absent a showing by the petitioner of good cause for the failure to comply with proper procedure. *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (per curiam).

Here, petitioner claims that he placed the notice of appeal in the mail at the prison before expiration of the thirty-day period, and asserts that he did not create the situation. However, petitioner was responsible to see that the notice of appeal was received by the clerk and timely filed to perfect the appeal. *See Sullivan v. State*, 301 Ark. 352, 784 S.W.2d 155 (1990) (per curiam); *Bragg v. State*, 297 Ark. 348, 760 S.W.2d 878 (1988) (per curiam).

We have declined to adopt the prison mail-box rule that is accepted in some courts, and which provides that a pro se inmate files his or her petition at the time the petition is placed in the hands of prison officials for mailing. *Hamel v. State*, 338 Ark. 769, 1 S.W.3d 434 (1999). An item tendered to a court is considered tendered on the date it is received and file marked by the clerk, not on the date it may have been placed in the mail. Petitioner's allegations that he mailed the notice of appeal prior to the expiration of the thirty-day period for filing do not establish good cause for failure to file the notice of appeal in a timely manner. *See Leavy v. Norris*, 324 Ark. 346, 920 S.W.2d 842 (1996)

(per curiam); *Skaggs v. State*, 287 Ark. 259, 697 S.W.2d 913 (1985) (per curiam).

Motion denied.